ATTORNEY FOR APPELLANT:

KURT A. YOUNG
Nashville, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

GERALD REED,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0701-CR-60
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Heather Welch, Magistrate
Cause No. 49G01-9511-PC-161354

September 21, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Gerald Reed appeals his fifty-five year sentence for two counts of Class A felony attempted murder and one count of Class C felony carrying a handgun without a license. We affirm.

Issue

The sole restated issue is whether the trial court adequately explained its decision to impose consecutive sentences.

Facts

Reed's case has a lengthy history. We quote extensively from our supreme court's recent opinion in this matter:

> In November 1995 then twenty-four-year-old Gerald Reed was charged with two counts of attempted murder for firing a weapon at police officers during a car chase. He was also charged with carrying a handgun without a license. The essential facts are these. In the early evening hours of November 1, 1995 Indianapolis police officer Marlene Neitzel was investigating a domestic disturbance on the northeast side of the city. Officers Michael Roach and William Beachum arrived on the scene to serve as back up. Reed appeared in the area and attempted to drive his car between Officer Neitzel's and Officer Roach's parked police cruisers. His car got stuck. An accident officer called to investigate this rather minor matter instructed Reed to back his car out of the jam. He did so, but then fled the area with several marked squad cars in pursuit. After about two minutes, Reed stopped his car, opened the car door, and fired a single gunshot at Officers Roach and Beachum who were in close proximity to each other. He then closed the door and began driving away. A few seconds later, Reed slowed down and fired two additional shots in the direction of Officer Beachum. Ultimately the pursuing officers disabled Reed's car with "stop sticks" and Reed was apprehended. The entire

pursuit lasted about ten minutes, and none of the officers was injured.

On November 2, 1995, the State charged Reed with the attempted murder of Officer Roach and carrying a handgun without a license as a Class A misdemeanor. The handgun charge was enhanced to a Class D felony because Reed had acquired a prior felony conviction. At Officer Beachum's request, the State filed an amended information on January 16, 1996 adding a charge of attempted murder of Officer Beachum. Reed waived his right to trial by jury and, after a bench trial, was convicted as charged. The trial court sentenced Reed to consecutive forty-year terms for the two attempted murder convictions and four years for the handgun conviction, to be served concurrently, for a total executed term of eighty years. He appealed. In an unpublished memorandum decision the Court of Appeals affirmed the trial court's judgment. Reed v. State, No. 49A05-9610-CR-438, 688 N.E.2d 436 (Ind. Ct. App. Dec. 22, 1997), trans. denied.

On September 14, 2000 Reed filed a pro se petition for post-conviction relief that was amended by counsel on February 23, 2004. The petition alleged the trial court erred in imposing consecutive sentences because they exceeded the limitation for a single episode of criminal conduct under Indiana Code section 35-50-1-2(c) (1995 Supp.). The petition also alleged that both trial and appellate counsel rendered ineffective assistance for failing to raise this issue at trial or on appeal respectively. Entering findings of fact and conclusions of law, the post-conviction court denied Reed relief and rejected his claims on the following grounds: (1) sentencing errors cannot be raised as freestanding claims--Reed thus waived this claim for review; (2) that even if waiver does not apply, the issue of consecutive sentencing was raised on direct appeal and decided against Reed and therefore is now res judicata; (3) trial counsel did not render ineffective assistance because counsel is not required to object to the trial court's sentencing determination in order to preserve the issue for review; and (4) appellate counsel did not render ineffective assistance because Reed did not demonstrate that counsel failed to present a significant and obvious issue for review. The post-conviction court also concluded that the two attempted murders were not a part of a

> single episode of criminal conduct. On review the Court of Appeals affirmed the judgment of the post-conviction court. Reed v. State, 825 N.E.2d 911 (Ind. Ct. App. 2005). In so doing the court agreed that Reed waived his freestanding sentencing claim and did not receive ineffective assistance of trial or appellate counsel.

Reed v. State, 856 N.E.2d 1189, 1192-93 (Ind. 2006).

Our supreme court held that Reed had received ineffective assistance of appellate counsel. Specifically, the court concluded that Reed's crimes constituted a single episode of criminal conduct and, therefore, the total permissible sentence Reed faced for these crimes was fifty-five years under the version of Indiana Code Section 35-50-1-2 in effect at the time of Reed's trial, and that appellate counsel was ineffective for not making this argument on direct appeal.[1] See id. at 1201. In conclusion, the court "remanded to the post-conviction court with instructions to enter a new sentencing order imposing a sentence not inconsistent with this opinion." Id. The court did not specify that Reed's sentence be modified to a term of fifty-five years.

On remand, the post-conviction court conducted another sentencing hearing. At its conclusion, the court first stated that it would not find hardship to Reed's sixty-year-old mother to be a mitigating circumstance. It continued:

---

[1] In November 1995, when Reed committed these crimes, Indiana Code Section 35-50-1-2(c) placed limits on consecutive sentences for crimes arising out of a single episode of criminal conduct to the then-presumptive sentence for the next class of felony above the most serious class of felony for which the defendant had been convicted. Also, as our supreme court noted, although the statute exempted "crimes of violence" from this limit, in 1995 the statute clearly did not include attempted murder as a "crime of violence." Reed, 856 N.E.2d at 1196-97. Thus, because our supreme court concluded that Reed's crimes were a single episode of criminal conduct, the maximum possible sentence Reed faced was fifty-five years, the then-presumptive sentence for murder, or the next class of felony above a Class A felony. The fifty-five year presumptive sentence for murder became effective July 1, 1995, before Reed committed these crimes. See Bufkin v. State, 700 N.E.2d 1147, 1152 (Ind. 1998).

But I am gonna find as a mitigating factor—after having listened to the evidence and argument and I did read the presentence report that was prepared back in 1996—I do believe that based upon that in the report his father was apparently an alcoholic and did mistreat him during his younger years. . . . The aggravating factors are that he has a history of criminal convictions . . . . The second aggravator is that he was on parole at the time that he committed these crimes for this Burglary, Robbery, and Confinement case. On Count I, Attempt Murder, the Court will find that the mitigators outweigh the aggravators. The Court will impose a sentence of 28 years executed. The Court will not suspend any of that time. . . . The Court will adopt the same aggravators and mitigators on Count III [attempted murder]. On that count the Court will find again the mitigators outweigh the aggravators. The Court will impose a sentence of 27 years executed. I will not suspend any of that time, and I will not aware [sic] him any credit time. Certainly in Justice Rucker's opinion on Page 11 he talks about that in general a trial Court cannot order consecutive sentences in absence of expressed statutory authority. And it talks about at the time that Reed committed the Attempted Murder that the statute limited the trial Court's authority to impose consecutive sentences if the convictions were not for crimes of violence and the convictions arose out of a single episode of criminal conduct. So, the limitation of that statute had been and has now is that according to the Supreme Court it is one single episode of criminal conduct. So, the maximum sentence a court could impose in this case would be 55 years which is the presumptive sentence on the next level of crime which would be Murder. So, the Court finds that certainly the law allows me to impose consecutive sentences. I believe based upon the factors that I've stated—and I didn't state but I'm not—and I'm not finding this as an ag—or aggravator, but I have read the presentence report. And back when he was sentenced both of these officers asked for the maximum and felt he was dangerous. They have the right to express their opinions. I'm not gonna find that as an aggravator; I don't think it's appropriate, but I will order that Counts I and III run consecutive for a maximum sentence of 55 years.

Tr. pp. 27-31. The post-conviction court did not alter Reed's sentence on Count II, Class C felony possession of a handgun without a license, which was four years to be served concurrent with the attempted murder sentences. Reed now appeals.

Analysis

It is well-settled that in order to impose consecutive sentences, a trial court must find the existence of one or more aggravating circumstances that outweigh any mitigating circumstances. See, e.g., Marcum v. State, 725 N.E.2d 852, 864 (Ind. 2000). If a trial court finds that the aggravators and mitigators are in balance, there is no basis upon which to impose consecutive sentences. O'Connell v. State, 742 N.E.2d 943, 952 (Ind. 2001). It logically follows that a trial court cannot impose consecutive sentences if it finds that the mitigators outweigh the aggravators and on that basis imposes less-than-presumptive sentences. See White v. State, 847 N.E.2d 1043, 1046-47 (Ind. Ct. App. 2006). Additionally, it does not appear that the 2005 change from "presumptive" to "advisory" sentences prompted by Blakely would affect this requirement, because Blakely did not invalidate Indiana's established consecutive sentencing system.[2] See Neff v. State, 849 N.E.2d 556, 562 (Ind. 2006).

We conclude the trial court did not adequately explain its decision to impose consecutive sentences. After finding that the mitigators outweighed the aggravators and that sentences for attempted murder below the presumptive were warranted, the trial

[2] In any event, this court has consistently held that where, as here, a defendant commits a crime before the switch to "advisory" sentences but is sentenced afterwards, the old "presumptive" sentencing scheme applies. See, e.g., Weaver v. State, 845 N.E.2d 1066, 1072 (Ind. Ct. App. 2006), trans. denied.

court failed to note the existence of any additional aggravating circumstance that would independently justify consecutive sentences. Cf. Gleaves v. State, 859 N.E.2d 766, 771 (Ind. Ct. App. 2007) (holding that trial court's decision to impose consecutive sentences was adequately explained where it noted the existence of an additional aggravator not discussed previously when it had decided to impose presumptive sentences).

Nevertheless, this error alone does not require either the imposition of concurrent sentences or a remand to the post-conviction court for resentencing. When a trial court fails to adequately articulate its reason for imposing consecutive sentences, this court may exercise its power to review the sentence and either revise or affirm it. Sanquenetti v. State, 727 N.E.2d 437, 442-43 (Ind. 2000). Indeed, it is always the case, under either the "advisory" or "presumptive" sentencing scheme, that if a trial court commits error in its sentencing statement, we have the option to affirm the sentence imposed if our review convinces us that the sentence is appropriate under Indiana Appellate Rule 7(B) in light of the nature of the offense and the character of the offender. See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007); Hope v. State, 834 N.E.2d 713, 718 (Ind. Ct. App. 2005). As a practical matter of judicial economy, we decline to remand for further proceedings in a case that is now before this court for the third time, has been before the post-conviction court twice, has been before our supreme court once, and has been in litigation for over ten years.

The imposition of consecutive sentences here is justified by the fact that Reed shot at two different police officers. The existence of multiple victims supports the imposition of consecutive sentences in order "'to vindicate the fact that these were separate harms

and separate acts against more than one person.'" Gleaves, 859 N.E.2d at 771 (quoting Serino v. State, 798 N.E.2d 852, 857 (Ind. 2003)).

As for the total length of Reed's sentence, we note that in his 1997 direct appeal we considered whether his eighty-year sentence was manifestly unreasonable. We concluded that it was not, in light of the nature of the offenses and Reed's character. Reed v. State, No. 49A05-9610-CR-438, slip op. p. 10 (Ind. Ct. App. Dec. 22, 1997), trans. denied.

Now, his sentence has been reduced by twenty-five years to fifty-five years. It is true that the current appellate standard for reviewing sentences is whether the sentence is inappropriate, and that this represents a standard much more favorable to defendants than the manifestly unreasonable standard. See Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App. 2007). Nevertheless, the defendant still bears the burden of persuading us that his or her sentence is inappropriate. Id. We decline to find Reed's fifty-five year sentence to be inappropriate, after having concluded ten years ago that an eighty-year sentence was not manifestly unreasonable. As we noted in that opinion, Reed has an extensive criminal history, and he fired several gunshots at two different police officers. The nature of the offenses and Reed's character warrant the sentence he received.

Conclusion

Although the trial court erred in failing to explain why it imposed consecutive sentences in this case, we independently conclude that Reed's sentence of fifty-five years is not inappropriate and affirm.

Affirmed.

KIRSCH, J., and ROBB, J., concur.